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In re Application of
Øystein Fodstadl
Serial No.: 09/125,953
Filed: December 10, 1998
Attorney Docket No.: 7885.56US
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: PETITION DECISION
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This letter is in response to the petition under 37 CFR 1.181, filed March 4, 2003, requesting withdrawal of the finality of the last Office action. The delay in acting on this petition is regretted, and has been occasioned by conversion of this application to an Image File Wrapper (IFW) application.

BACKGROUND.

A review of the file history shows that the examiner mailed a first Final Office action to applicants on February 27, 2002, setting a three month shortened statutory period for reply. Claims 2-3, 5-9 and 12 were rejected under 35 U.S.C. 112, first paragraph, as directed to subject matter not described in the specification or as non-enabled.

An amendment after Final rejection was filed on July 26, 2002, including a request and fee for a two month extension of time. The amendment was accompanied by an unsigned affidavit by the inventor under 37 CFR 1.132.

The examiner issued an Advisory Action on August 13, 2002, in which it was indicated in the remarks that the affidavit had not been considered as it was unsigned and was not directed solely to new points of argument or issues raised in the last office action.

On August 26, 2002, applicants filed a Request for Continued Examination (RCE) with a further extension of time request and fee therefor accompanied by a signed copy of the previously submitted affidavit and requesting that the previous amendment be entered and the finality of the last Office action be withdrawn.

On October 3, 2002, the examiner mailed a new Final Office action to applicants noting the filing of the RCE and repeating the rejections of record. On page 5 of the Office action receipt of the signed copy of the affidavit was acknowledged with the examiner indicating that its submission was untimely. Nevertheless, the affidavit was considered and commented on in the next two paragraphs on page 5, the conclusion being that the affidavit was insufficient to overcome the rejection. In view of the same rejection being made for the same reasons as in the previous Office action the action was made Final.

On March 4, 2003, applicants filed a request for a three month extension of time and requisite fee therefor, an amendment after Final rejection and a petition to withdraw the finality of the last Office action. On April 3, 2003, a second RCE was filed. As noted above, because of the conversion of this application to an IFW application at about the time these papers were filed, the petition inadvertently was not forwarded for consideration until recently.

DISCUSSION

Applicants contend that the last Office action should not have been made Final because the affidavit was timely filed in view of the RCE filing of August 26, 2002, and should have been considered. Applicants have misinterpreted the examiner's comments regarding the affidavit. While the examiner indicated that the affidavit was untimely - i.e., that it could (and perhaps should) have been presented earlier - the examiner did not indicate that the affidavit was not considered. While the unsigned affidavit was specifically not considered in the preceding Advisory Action, the examiner in the Final Office action of October 3, 2002, specifically commented on the affidavit and why it was considered insufficient to overcome the rejection of record. Applicants' argument of non-consideration is thus not found to be supported by the record.

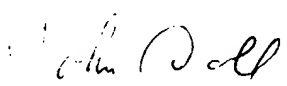
It is also noted that 37 CFR 1.181(b) requires that petitions to the Commissioner regarding any action by an examiner must be filed within two months of the action complained of (some exceptions to this requirement do exist). This petition regarding premature finality of an Office action - an action by the examiner - was not filed until almost six months after the action being complained of and can, therefore, be considered untimely.

DECISION

The petition is **DENIED** for either or both of the reasons set forth above. Finality of the last Office action is deemed to be proper.

The application will be forwarded to the examiner for further consideration of the application in view of the filing of a second RCE.

Should there be any questions with respect to this decision, please contact William R. Dixon, Jr., by mail addressed to: Director, Technology Center 1600, P.O. Box 1450, Alexandria, VA 22313-1450, or by telephone at (703)308-3824 or by facsimile transmission at (703) 305-7230.

John Doll 
Director, Technology Center 1600